No. 56PA14-2 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

EVERETTE E. KIRBY and wife, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, as Executor of the Estate of Frances Hendrix; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL, STEPHEN STEPT; JAMES W. NELSON and wife PHYLISS NELSON; and REPUBLIC PROPERTIES, LLC, a North Carolina company (Group 1 Plaintiffs),	)	From Forsyth County
Plaintiffs,	)	
v.	)	
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

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NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION'S
REPLY BRIEF

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****

NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION'S
REPLY BRIEF

****

Appellant, the North Carolina Department of Transportation, pursuant to Rule 28(h) of the North Carolina Rules of Appellate Procedure, respectfully submits this brief in reply to certain arguments made in the "Plaintiffs/Appellees New Brief."

ARGUMENT

Plaintiffs repeatedly assert that NCDOT's use of the Map Act effects a taking of every property located within the protected transportation corridor for the planned Winston-Salem Northern Beltway. Their brief is replete with references to "all owners" together with various claims concerning the alleged unconstitutionality of the legislation. As such, Plaintiffs arguments have drifted far from the proper parameters of the case, away from a discussion of the basis for claims made by the specific parties to the case and an analysis of the legal rulings set forth in the decision of the Court of Appeals. Review by this Court does not open the door for Plaintiffs to bring forward matters that were not decided below and, in some circumstances, were not even included in their pleadings. Instead, this Court's proper focus is to determine whether there is error of law in the decision of the Court of Appeals and whether the relief awarded to the parties to the case has a proper legal and evidentiary basis.

A proper reading of this Court's prior decisions, specifically including the decision involving properties within the same transportation corridor maps at issue

here, *Beroth Oil Company v. N.C. Department of Transportation*, 367 N.C. 333, 757 S.E.2d 466 (2014), reveals the fundamental errors of law made by the Court of Appeals and the misstatements that pervade the arguments by Plaintiffs in their New Brief to this Court. As explained in NCDOT's New Brief, the Court of Appeals erred by apparently creating a per se taking cause of action for Plaintiffs and any owner of property within the limits of a transportation corridor map filed under the Map Act. The Court of Appeals improperly found a categorical taking without determining that the Map Act's "perpetual" regulations resulted in a deprivation of all practical or economically beneficial use of the properties, and without any evaluation of Plaintiffs' ability to use their properties. The court incorrectly held that the Map Act is an eminent domain statute which falls outside the State's police power, that recording maps under the Map Act was an exercise of eminent domain and a taking, and that Plaintiffs' inverse condemnation and declaratory relief taking claims were ripe.

Plaintiffs' New Brief goes wildly astray, unconstrained by either the issues properly presented for review or this Court's decision in *Beroth*. This Court should reject all arguments that are outside the proper scope of review in this case as well as any attempt to expand the issues presented beyond those concerning the specific parties to the action. And this Court should reiterate what it has said in prior

decisions: that a taking occurs only when governmental action deprives an owner of all practical use or beneficial enjoyment of property.

1. Plaintiffs Improperly Assert An Entitlement To Relief For All Property Owners And On The Basis Of Constitutional Claims That Are Not Before The Court.

Plaintiffs repeatedly refer to and make arguments on behalf of property owners within the protected transportation corridor that are not parties to this action. *See, e.g.,* Pl. Br. at 20 ("each Beltway Property"), Pl. Br. at 23 ("each and every Beltway Property"), Pl. Br. at 29 ("all Beltway properties"), Pl. Br. at 50 (the "Beltway's impact on every Appellee's (and every owner's) parcel"), Pl. Br. at 52 ("Appellees (and owners) are concerned"), Pl. Br. at 52 ("Appellees and owners"). The purported advocacy on a global basis culminates in Plaintiffs' declaration that the "day has arrived for Appellees, and all other owners" to have their properties purchased by the NCDOT. (Pl. Br. at 58) Plaintiffs also discuss matters related to "150 newly filed cases" (Pl. Br. at 52) and motions filed by "Appellees counsel . . . in all 240+ Map Act cases" (Pl. Br. at 53).

There is no proper basis upon which the owners of the nine properties who are the parties to this case can advocate on behalf of others. They are not proceeding in a representative capacity, and this Court has expressly rejected any generalized analysis of the merits of the takings claims asserted by various property owners

arising from the same transportation corridor maps at issue here. The *Beroth* decision held that a class action was inappropriate because not all properties "within the corridor are affected in the same way and to the same extent." 367 N.C. at 343, 757 S.E.2d at 474. Furthermore, this Court held that a "discrete fact-specific inquiry is required" because "liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." *Id*. Plaintiffs have improperly asserted a taking on a broad and generalized basis in contravention of this Court's guidance that "ad hoc, factual inquiries into the circumstances of each particular case" must be undertaken to determine whether a taking of any specific party's property rights has occurred. *Beroth*, 367 N.C. at 342, 757 S.E.2d at 473 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224, 89 L. Ed. 2d 166, 178-79 (1986)).

Additionally, Plaintiffs make repeated references to constitutional matters, culminating in an argument asserting that "The Map Act is Unconstitutional." *See*, Pl. Br. at 30, 36, 46, 47, 53-57. While acknowledging that the Court of Appeals did not reach any state or federal constitutional claims, Plaintiffs suggest that their "constitutional claims should be granted" if "inverse condemnation is not an available remedy." (Pl. Br. at 54) Plaintiffs then declare that "[t]he Map Act is unconstitutional, both facially and as-applied" (Pl. Br. at 55), and make generalized

references to the asserted violation of their "due process rights" and their "right to equal protection under the law" (Pl. Br. at 55-56).

No constitutional matters are properly before the Court. They were not reached by the Court of Appeals, and are not within the scope of the issues presented in the Petition for Discretionary Review that was granted by this Court. The Plaintiffs did not present any constitutional matters as additional issues for review pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure. And NCDOT's notice of appeal pursuant to N.C.G.S. § 7A-30 on the basis of a substantial constitutional question was "dismissed *Ex Mero Motu* by order of the Court" in the 20 August 2015 Order allowing NCDOT's Petition for Discretionary Review.

This Court should ignore any asserted constitutional claims by Plaintiffs and reject any claimed entitlement to relief on such basis.

2. The Map Act Is A Regulatory Enactment Within The Proper Scope Of The State's Police Power.

In furtherance of their takings claim Plaintiffs assert that "[t]he Map Act is not regulatory in any way whatsoever. It is solely confiscatory." (Pl. Br. at 22) They further proclaim that the challenged legislation cannot be within the scope of the police power because "NCDOT never addresses" how the object of the statute furthers a legitimate public purpose (Pl. Br. at 24), alleging that the protection of a

future roadway corridor is not within the meaning of the "general welfare" for purposes of the police power (Pl. Br. at 25). Plaintiffs argue that only public health and safety concerns are within the proper scope of the police power and that to include the Map Act's restrictions within the concept of "general welfare" would "mean the police powers have no boundaries," citing as authority a dissenting opinion from a 1925 Oregon case. (Pl. Br. at 27)

Plaintiffs' argument is wrong at every turn. The fundamental flaw is the failure to acknowledge the regulatory nature of the actions and to apply an appropriate regulatory taking analysis to determine whether the Map Act constitutes legislation outside the scope of the State's police power.

As previously demonstrated, the Map Act is proper regulatory legislation within the scope of the State's police power. *See* NCDOT New Br. at 21-29. Legislative authority pursuant to the police power is "as extensive as may be required for the protection of the public health, safety, morals and general welfare," *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979), and "may be extended or restricted to meet changing conditions, economic as well as social," *id*. at 214, 258 S.E.2d at 449 (citations omitted).

Plaintiffs' claim that the Map Act is not in furtherance of the general welfare is inconsistent with prior decisions concerning the scope of the police power. As recognized by this Court in support of its conclusion that the preservation of historically significant residential and commercial districts protects and promotes the general welfare,

> [p]roper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy . . . . Nor need the values advanced be solely economic or directed at health and safety in their narrowest senses. The police power inhering in the lawmaker is more generous, comprehending more subtle and ephemeral societal interests.

A-S-P, 298 N.C. at 215, 258 S.E.2d at 449 (quoting from *Maher v. City of New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975)).

The regulation of land use is a common police power function. The Map Act is similar to other legislation allowing governments to place limitations on certain types of land use in planned highway corridors to promote orderly growth and development. And this Court has recognized the public purpose of protecting the general welfare by the preservation of a future roadway corridor from residential development, a circumstance highly analogous to the situation presented here.

A local subdivision ordinance requiring that a property owner take into account future road plans was expressly upheld by this Court in *Batch v. Town of Chapel Hill*,

326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990). The General Assembly's authorization for the town to require a developer to take future as well as present road development into account as a condition for obtaining a subdivision permit was found in N.C.G.S. § 160A-372, with parallel authority for counties provided in N.C.G.S. § 153A-331. *Batch,* 326 N.C. at 13, 387 S.E.2d at 663. This Court then held:

> A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision.

Id.

This Court has held that regulation of a property owner's right of access when a public roadway is designated as a controlled access highway "in the interest of public safety, convenience and general welfare" is an exercise of the State's police power, and that "impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation." *Wofford v. N.C. State Highway Commission*, 263 N.C. 677, 682, 140 S.E.2d 376, 380 (1965).

A proper analysis of the Map Act demonstrates why Plaintiffs are wrong when they characterize the purpose and effect of the legislation as an invalid exercise of the

police power solely motivated by future property acquisition. The circumstances presented, as documented in the Record before the trial court, established that the legislative purpose was within the proper scope of the police power as defined by prior decisions of this Court.

It is inaccurate to describe cost-cutting as the only purpose of the Map Act regulation of development within a protected corridor. The decision below acknowledged but dismissed numerous other policy considerations that were articulated by the NCDOT including facilitating orderly and predictable development, preserving the ability to build roads in locations that have the least impact on the natural and human environments, and minimizing the number of businesses, homeowners and renters who will have to be relocated when a project is authorized for right-of-way acquisition and road construction. (Slip Op. 32-33) The Court of Appeals gave no weight to matters "that are purportedly prevented or averted as a result of the Map Act's restrictions" because "there is no detriment to the public interest that the Map Act's purported 'regulations' will prevent unless NCDOT needs to condemn Plaintiffs' respective properties." (Slip Op. 34)

The apparent invalidation of the prevention of a harm as a legitimate public interest within the scope of the police power, as well as the implication that such legislation must be in response to an existing impairment of the public interest,

cannot be reconciled with this Court's prior decisions regarding the police power. Furthermore, it is hard to understand why the prudent management and use of public funds is outside the legislative prerogative to enact statutes to protect and further the public welfare. It should be undisputed that saving taxpayer's money, lowering the cost of designing and building the State's transportation infrastructure, and minimizing disruption to the community and environment are within the scope of matters that the General Assembly can properly take into account.

The police power permits regulation of the use of property "when the legislative body has reasonable basis to believe that it will promote the general welfare by conserving the values of other properties and encouraging the most appropriate use thereof." *Blades v. City of Raleigh*, 280 N.C. 531, 546, 187 S.E.2d 35, 43 (1972). Furthermore, "there is a presumption that a particular exercise of the police power is valid and constitutional . . . and the burden is on the property owner to show otherwise." *A-S-P*, 298 N.C. at 226, 258 S.E.2d at 456 (citations omitted). And:

> the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

Finch v. Durham, 325 N.C. 352, 373, 384 S.E.2d 8, 21 (1989) (quoting *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938)).

3. The Effect Of A Particular Governmental Action Determines Whether It Constitutes A Taking.

In furtherance of their claimed entitlement to damages, Plaintiffs assert an unprecedented proposition: that "[s]ubstantial interference with any property right is a taking," and that "[t]he destruction of any attribute of property destroys the property." (Pl. Br. at 29) Under this drastic standard, "'use' in any measure is an irrelevant factor" (Pl. Br. at 27) and this Court's prior cases involving highway mapping activities are "irrelevant" (Pl. Br. at 43). These broadside claims do not withstand analysis.

Prior decisions of this Court demonstrate that a proper takings analysis necessarily takes into consideration the effect of a particular governmental action on a property owner. And, as noted by the Court of Appeals in its prior *Beroth* decision:

> In the context of a regulatory taking, the relationship between the police power and eminent domain power can be described as a continuum: where State regulation under its police power "goes too far," the State is, in essence, exercising its eminent domain power. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (quoting *Pennsylvania Coal Co*. [*v. Mahon*], 260 U.S. [393,] 415[, 67 L. Ed. 322, 326] (1922)], for the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

Beroth Oil Co. v. NCDOT, 220 N.C. App. 419, 436, 725 S.E.2d 651, 663 (2012), *affirmed in part and vacated in part*, 367 N.C. 333, 757 S.E.2d 466 (2014).

If regulatory action goes too far it can become a taking within the scope of the power of eminent domain requiring the payment of compensation to the affected property owner. Where the exercise of governmental police power ends and the use of the power of eminent domain begins is not susceptible to precise mathematical delineation. The appropriate analysis, as set forth in various decisions by this Court, is whether the governmental action results in the "substantial interference" with the use of a property so as "to injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof."

It has long been recognized that "[t]he question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain." *Department of Transp. v. Harkey*, 308 N.C. 148, 153, 301 S.E.2d 64, 67-68 (1983) (quoting *Barnes v. N.C. State Highway Commission*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962)). This Court declared in *Finch*, that "[t]he test to determine whether a taking has occurred is set forth in *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983)." 325 N.C. at 363, 384 S.E.2d at 14.

Under that "ends-means" test, the court must engage in a two-part analysis to decide whether the "particular exercise of the police power was legitimate, by determining whether the ends sought, i.e., the object of the legislation, is within the scope of the power, and then whether the means chosen to regulate are reasonable." *Finch*, 325 N.C. at 363, 384 S.E.2d at 14 (citations and quotation marks omitted). *See also A-S-P*, 298 N.C. at 214, 258 S.E.2d at 448-49. Under the reasonable interference prong, the court must examine the facts and determine whether the owner "was deprived of all practical use of the property and the property was rendered of no reasonable value." *Finch*, 325 N.C. at 364, 384 S.E.2d at 15 (citation and quotation marks omitted). The proper focus must be on the extent to which an owner's ability to use property has been deprived, as a "taking" has been defined as:

> entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Penn v. Carolina Virginia Coastal Corporation, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950).

As previously explained, this is the proper context for the oft-quoted "substantial interference" language from *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982). *See* NCDOT New Br. at 31-34. It does not and cannot mean that

governmental interference with any property right amounts to a taking. "A taking does not occur simply because government action deprives an owner of previously available property rights." *Finch*, 325 N.C. at 366, 384 S.E.2d at 18 (quoting from *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130, 57 L. Ed. 2d 631, 652 (1978)). And "not every act or happening injurious to the landowner, his property, or his use thereof is compensable." *Long*, 306 N.C. at 199, 293 S.E.2d at 109.

Plaintiffs are fundamentally wrong when they declare that "[t]he State exercises its power of eminent domain when it obtains public benefits from property owners" (Pl. Br. at 22), and assert that "NCDOT has taken all of the fee interest by its interference with owners' property rights" (Pl. Br. at 52).

The Map Act, similar to zoning ordinances, regulates future uses of property in furtherance of the general welfare and for the public benefit. In the context of a challenge to a local zoning ordinance, this Court has held that "the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason" to invalidate the ordinance as an inappropriate exercise of the police power. *A-S-P*, 298 N.C. at 218, 258 S.E.2d at 451. Allowing a takings claim to go forward based upon the limited impairment of some property rights is inappropriate because "the denial of one traditional property right does not always

amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66, 62 L. Ed. 2d 210, 223 (1979).

The inverse condemnation action upheld in *Long* involved a complaint alleging frequent and intense noise and vibration created by aircraft at low altitudes "so great that it is unbearable to a normal human being" rendering the plaintiffs' property "almost unlivable." *Long*, 306 N.C. at 191, 293 S.E.2d at 105. As such, this Court's holding fully comported with the requirement that the complaint establish action injuriously affecting property "in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Penn*, 231 N.C. at 484, 57 S.E.2d at 819. Application of the *Penn* standard to the facts and circumstances here, where Plaintiffs universally have continued to occupy and use their properties, conclusively demonstrates that they have not established a compensable taking.

This Court should reject Plaintiffs' asserted entitlement to relief and instead reaffirm the holding that

> the mere laying out of a right of way is not in contemplation of law a full appropriation of the property within the lines. Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and

> the owner's right to compensation arises only from the actual taking or occupation of the property.

Browning v. State Highway Comm'n, 263 N.C. 130, 138, 139 S.E.2d 227, 232 (1964).

4. Plaintiffs' Arguments Based On Statutes And Cases From Other Jurisdictions Are Irrelevant And Inaccurate.

Plaintiffs devote substantial attention to wholly irrelevant matters, including a review of the terms of roadway corridor statutes in other states (Pl. Br. at 31-35), and "[a] list of cases from states that have found reservation and land banking statutes to be unconstitutional takings" (Pl. Br. at 36-42). No explanation is offered as to why this Court should accord these matters any precedential or persuasive value. The duration of the reservation period under North Carolina's statute is not at issue. Nor is the constitutionality of the Map Act before the Court.

In the event the Court does not ignore as irrelevant these matters from other jurisdictions, care should be taken before any reliance is placed on the statements and representations that are made. Two examples illustrate why.

First, Plaintiffs describe the decision in *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990), as a "seminal ruling" for the proposition that "[r]eservation statutes have universally been found to take owner's property rights." (Pl. Br. at 35) As previously demonstrated, such reliance upon the *Joint Ventures* case is erroneous. *See* NCDOT New Br. at 35-36. Subsequent decisions by

the Florida Supreme Court make clear that the *Joint Ventures* decision did not establish that a per se taking occurred as to every owner of property located within a highway map of reservation. *See Palm Beach County v. Wright*, 641 So. 2d 50, 52 (Fla. 1994) ("[W]e held that landowners with property inside the boundaries of maps of reservation invalidated by *Joint Ventures, Inc*., are not legally entitled to receive per se declarations of taking."). The determination of whether a highway map constitutes a taking must be conducted on a case-by-case, ad hoc factual basis. *Id*. at 54. Additionally "*Joint Ventures* should not be read to mean that all properties located within the maps of reservation were per se taken without just compensation;" instead, a taking occurs only where the "regulation denies substantially all economically beneficial or productive use of land." *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

Second, Plaintiffs include an Illinois case from 1950 in their list of decisions finding unconstitutional takings. (Pl. Br. at 41-42) In a subsequent case, the Illinois Supreme Court held that the state's highway corridor statute fell within the police power and did not effect a taking requiring the payment of compensation. *Davis v. Brown*, 221 Ill.2d 435, 851 N.E.2d 1198 (2006).

CONCLUSION

This Court should vacate the decision of the Court of Appeals and reinstate the order entered by the superior court.

Respectfully submitted this the 23rd day of November 2015.

ROY COOPER
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Electronically Submitted
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N.C. App. R. 33(b) Certification:
I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **NORTH CAROLINA DEPARTMENT OF TRANSPORTATION'S REPLY BRIEF**in the above titled action upon all parties to this cause by:

[ ] Hand-delivering a copy hereof to each said party or to the attorney thereof;

[X] Transmitting a copy hereof to each said party via email; and

[X] Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly addressed to:

Matthew H. Bryant
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This the 23rd day of November 2015.

Electronically Submitted
John F. Maddrey
Solicitor General